


THE FUTURE USE OF CORPORATE WARRIORS WITH THE U.S. ARMED FORCES: LEGAL, POLICY, AND PRACTICAL CONSIDERATIONS AND CONCERNS

 **COL David “Dave” A. Wallace, USA**

“How is it in our nation’s interest to have civilian contractors, rather than military personnel performing vital national security functions ... in a war zone?”¹

U.S. Senator Carl Levin (D-MI)

The privatization of warfare has led to many interesting and complex issues. Among the myriad of issues is what role, if any, private security contractors should play in augmenting the U.S. armed forces future force structure. Against this backdrop, the article highlights certain considerations policymakers, military leaders, and force planners should balance when analyzing the future use of private security contractors. To make a proper determination on the future use of private security contractors, decision makers must weigh the benefits associated with the capabilities and characteristics of private security contractors with the costs of using such private actors. In that context, the article addresses several overarching legal policies, practical concerns, and risks associated with their future use.

Keywords: *Private Security Contractor, Outsourcing, Force Planning, International Humanitarian Law, U.S. Military, Armed Conflicts*

Future Utilization of Private Security Contractors vs. Military Soldiers



As U.S. force planners and policymakers assess our future security needs, establish the resulting military requirements, and weigh and make choices within a resource-constrained environment (Bartlett, Holman, & Somes, 2004) to find the right capabilities, size, and mix for the *U.S. military* 15 to 20 years from now, a critical consideration will be what, if any, role *private security contractors* should play in augmenting that future force on the battlefield (Owens, 2004). This article asks whether the U.S. military and other federal entities that accompany the armed forces during future *armed conflicts* should contract for security services in light of several critical policies, as well as legal and practical risks and concerns.

The article is divided into a three-part analysis. First, it frames the comprehensive context by a) considering the historical use of private security contractors; b) defining private security contractors in the context of the nature and scope of the services they provide; and c) exploring an appropriate paradigm for future U.S. *force planning*. Second, it considers several overarching legal policies, practical concerns, and risks associated with the future use of private security contractors. Finally, it discusses the way ahead by advocating a coordinated, collaborative, and concentrated effort by both the legislative and executive branches to address the underlying question.

FRAMING THE ISSUE: USE OF PRIVATE SECURITY CONTRACTORS DURING WARTIME

HISTORICAL USE OF PRIVATE SECURITY CONTRACTORS

In every conflict since the American Revolution, the U.S. military has always relied heavily upon civilian contractors for the provision of goods and services (Davidson, 2000). Civilian contractors have supported our nation's fighting forces with a wide array of service support, primarily in rear areas away from hostilities in a war zone (Industrial College of the Armed Forces, 2007). Although, the employment of civilian support contractors by the U.S. armed forces is certainly not new, the proliferation and expanded use of armed civilian contractors performing vital security functions in the combat zones of Iraq and Afghanistan that are, in many cases, indistinguishable from missions performed by their uniformed counterparts, is the latest chapter in a recent and growing worldwide phenomenon that began in the late 1980s and early 1990s (Rosen, 2005; Singer, 2003, pp. 49-55). In other words, the current use of contractors in security roles, rather than simply providing supply and logistics support, contrasts with the historical use of contractors.

The end of the Cold War, coupled with the broader governmental trend in privatization and reinventing government, marked a profound change in the evolution of warfare with the emergence and ever-increasing reliance upon so-called private security contractors (Mlinarcik, 2006). The confluence of these dynamic forces led to and helped shape this new market for armed security services from the private sector not only in the United States, but also in coun-

tries spanning the globe. According to P.W. Singer, an expert on the private security industry, the collapse of the Berlin Wall and the close of the Cold War created a “security vacuum” (Singer, 2003, p. 49). In order to reap a “peace dividend,” nations, including the United States, began to downsize their armed forces (Singer, 2003, pp. 49-50). The United States, for example, decreased the size of its military by 40 percent beginning in the late 1980s (Adams, 2002). Accordingly, this dramatic reduction in force structure led to an inevitable pool of experienced, ex-military personnel available to contract out their services (Avant, 2007).

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United States Naval War College Professor Larry McCabe observed that an economic aspect to the emergence of private security contractors concerned the transition in the 1990s to a greater high-tech service economy (personal communication, February 16, 2008). More specifically, many former military personnel were unprepared and did not have the requisite skill sets necessary to make the transition into the new economy. Naturally, former military personnel were attracted to those jobs for which they were trained.

Against this backdrop, a growing number of smaller, but arguably strategically important conflicts emerged around the world. Put differently, the global security environment shifted dramatically during this period with the eruption of small, nationalist, and independence movements—movements in small countries without standing security forces, government or private. For example, during the 1990s the United States placed an emphasis on American-led peacekeeping, peacemaking, and nation-building operations that found our downsized forces participating in military operations in conflicts like Bosnia, Haiti, Somalia, and Kosovo.²

The *outsourcing* of security services continued unabated post-9/11 by the U.S. military and other related federal agencies during armed conflicts, a fact largely unknown to the public and even to some of our federal elected representatives. The killing and mutilation of four Blackwater private security contractor employees in Fallujah and the ensuing media attention revealed the extensive use of such “private soldiers” (Cameron, 2006).

The number of contractors used by the U.S. Government in Iraq and Afghanistan is remarkable. A recent congressional report estimated the total number of private contractors, including subcontractors, working in Iraq pursuant to U.S. Government-funded contracts at approximately 182,000³ or 10 times as many per military soldier as the 1991 Gulf War (Quirk, 2004). Of that number, approximately 20 to 30 thousand individuals are performing protective security functions for private firms pursuant to U.S. Government contracts in Iraq.⁴ The rest perform myriad functions, including logistical support for U.S. forces, execution of major reconstruction projects, translator support, consulting for the

U.S. command, and advisory operations for Iraqi army and police units. Even though this article is limited to security contractors, there is significant debate and controversy regarding the use of contractors in the area of logistics, reconstruction, and capacity building because of the resources devoted to those efforts. Additionally, in relative terms, the number of security contractors is relatively small in relation to number of contractors engaged in logistical support, reconstruction, and capacity building.

PRIVATE SECURITY CONTRACTORS: DEFINITION AND SCOPE OF SERVICES

Private business organizations providing professional services that are linked to warfare are referred to as “privatized military firms” (Singer, 2003, p. 8); “private military companies” and “private security companies” (Gillard, 2006; Perry, 2007); other less flattering names such as “mercenaries,” “whores or dogs of war,” or “shadow soldiers” (Zabci, 2007); “private soldiers”; and “contract or corporate warriors.” The most important consideration, however, is not what these individuals and the firms that employ them are called, but rather what they are doing in the combat zone.

For the purpose of this analysis, the term, “private security contractors” refers to those actors who perform a wide range of security-related tasks that include, but are not limited to: protecting people (including military personnel, State Department officials, and other high-value targets); guarding facilities; escorting convoys (considered to be among the most dangerous jobs in Iraq); staffing checkpoints; and training and advising security forces (Singer, 2007, p. 3).

In an effort to explain the role and nature of private security contractors in Iraq and Afghanistan, former Secretary of Defense Donald Rumsfeld told Congress that private security contractors were hired only to provide defensive services (Rumsfeld, 2004). In making any meaningful distinction between offensive and defensive operations, the challenge, of course, lies in the nature of the environment, the enemy, and some of the tasks and functions private security contractors are performing. The environment is a complex battlespace that is highly ambiguous and fluid. There are no positional front lines or rear areas like some traditional armed conflicts. Sporadic but intense fighting is happening everywhere. The enemy is mixing with the civilian population and using tactics, techniques, and weapons to engage our forces (including private security) in hostilities, usually at the time and place of the enemy’s choosing. Although all insurgencies are inherently complex and ill-structured, the fighting in Iraq is further complicated by sectarian violence coupled with nascent and relatively weak governmental security forces. Moreover, Department of Defense guidance specifically provides, “Contracts for security services shall be used cautiously in contingency operations where major combat operations are ongoing or imminent” (DoDI 3020.41, 2005).

Given the prospective nature of the overarching question, it is important to understand and appreciate that many other countries have and continue to use

private security contractors in a far more expansive way than the United States. In fact, armed security actors have been significant and, in some cases, the determinative players in conflicts (Singer, 2003, p. 9). For example, in Angola, the government hired Executive Outcomes (EO), a South African private security firm, to retrain their armed forces and lead them into battle. In the course of the conflict, EO employees piloted Angolan Air Force planes and participated in commando raids (Singer, 2003, p. 9). In another well-known example from Africa involving EO, the government of Sierra Leone contracted with the firm to quell a rebellion and establish order in the West African, diamond-rich nation (Adams, 2002, p. 57). In describing the profound impact EO had in driving the rebels back from an assault on Freetown, McIntyre & Weiss (2007, p. 73) cited Singer (2003, p. 4):

When the rebels approached within 20 kilometers of the capital of Freetown, fears that the war would end in a general massacre grew. Most foreign nationals and embassies hurried to evacuate the country. The situation appeared hopeless. Almost immediately, though, the circumstances completely reversed. A modern strike force quickly deployed and hammered the rebel forces with precision air and artillery strikes.

In sum, whether one views the roles and missions performed by private security contractors through a U.S. perspective or an international lens, clearly these corporate warriors are engaged in military duties that are, in many circumstances, identical to their counterparts in national armed forces. Conventional distinctions such as offense vs. defense, uniformed vs. nonuniformed, or public vs. private fade away amidst the fog and friction of combat.

FUTURE FORCE PLANNING

The perspectives, on an appropriate framework for determining future U.S. force structure and capabilities, are as varied as the number of strategic thinkers and planners considering the issue. Planning first requires a strategy—an articulation of national goals and objectives, and the allocation of the national elements of power to achieve that strategy's aims. Assuming military force is required to meet the strategic aims, planners must next ask what characteristics should the required force possess; how much force is necessary; and what risks are associated with the force and how such forces can be managed (Naval War College Professor L. McCabe, personal communication, January 28, 2008). Accordingly, a logical first step in an analysis of future U.S. force structure involves consideration of potential security environments in which the U.S. military may operate. The current National Security Strategy (NSS), the National Defense Strategy (NDS), the National Military Strategy (NMS), Quadrennial Defense Review (QDR), and the Capstone Concept for Joint Operations (CCJO) envision the United States facing a number of dangerous and pervasive worldwide threats in the future that generally fall into four categories or challenges: irregular,⁵ catastrophic,⁶ traditional,⁷

and disruptive challenges.⁸ Within this context, the U.S. strategic objectives include: securing the United States from direct attack, securing strategic access and retaining global freedom of action, strengthening alliances and partnerships, and establishing favorable security conditions (DoD, 2005a).

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egy to address the security environment, national interests, and objectives. Since the end of the Cold War, such strategies have included: a two-military-theater-of-war approach, a 1-4-2-1 paradigm, and the current 1-1-1 construct.⁹ Such paradigms require war planners to balance obligations and capabilities of the American military to defend the United States while simultaneously being able to respond to multiple worldwide contingencies. Given the frequency of change in these strategies, such paradigms will likely continue to evolve, but with many of the elements that are common to the previous strategies.

The next step will consider the capabilities and characteristics of the future forces. The Department of Defense adopted a capabilities-based (versus a requirements-based) planning focus (DoD, 2005a). Among the desired operational capabilities of a future force are the ability to protect critical bases of operation, improving proficiency against irregular challenges, and increasing the capabilities of our security partners.¹⁰ The future force must have certain key characteristics or attributes, including: knowledge empowered, networked, interoperable, expeditionary, adaptable/tailored, enduring/persistent, precise, fast, resilient, agile, and lethal (DoD, 2005b, p. 20).

It is apparent that private security contractors possess a number of these important capabilities and characteristics. In terms of attributes that would make them a force multiplier for future conflicts, private security contractors can be adaptable/tailored, precise, fast, agile, and lethal. The government, for example, can expand, shrink, and refine the contractor workforce structure very quickly by means of solicitation and statement of work process. Highly skilled contractors can be retained to execute a contract on an ad hoc basis in whatever numbers the government needs to accompany the armed forces or other government entities to address a wide ranging array of security concerns. Additionally, procurement officials may use a variety of legal authorities and contract types to award such contracts quickly and efficiently, and terminate them immediately at the conflict's end, with no back-end retirement or medical costs to the government. Within the military force structure, however, it often takes years to make significant changes.

After consideration of the nature of the future security challenges (i.e., ir-

regular, disruptive, traditional, and catastrophic), it does not take much imagination to envision how private security contractors could augment U.S. forces in a variety of scenarios. The United States could, for example, use armed contractors with the appropriate skill sets to provide a continuum of services. For example, contractor personnel could serve as peacekeepers or peacemakers (e.g., support U.S. efforts in conflicts like Darfur); locate, tag, and track terrorists; secure critical infrastructure, lines of communication, and potential high-value targets; and assist in foreign internal defense. Moreover, private security contractors could arguably be used as a constabulary force during a military occupation or during stability and support operations. Given that a number of private security firms employ highly skilled former special operations personnel, it is readily foreseeable that contractors could add value to special operations forces as they work to meet the challenges of irregular conflicts or catastrophic challenges.

Furthermore, in a resource-constrained environment, private security contractors have an intuitive appeal. The government can hire the armed security contractors only when needed. Their services can be terminated at the convenience of the government when the contingency ends; contractors can also be terminated for default if they fail to perform. The contractual agreements can specify the skill sets necessary to satisfy the government's requirements. In sum, security contractors offer important capabilities and attributes that potentially make them an attractive option for future strategic planners. There are, however, significant risks and concerns associated with using private security contractors to augment the future force.

RISKS/CONCERNS REGARDING THE FUTURE USE OF PRIVATE SECURITY CONTRACTORS

The first issue involves highly skilled military personnel leaving the armed services and joining the ranks of private contractors. Private security contractors have and will likely continue to draw heavily from the ranks of U.S. armed forces, active and retired, particularly special operations forces (Whitelow, 2007).

The Government Accountability Office (GAO, 2005, p. 36) reported, in part:

Servicemembers with Special Operations background are often hired to fill key positions, such as security advisors and project managers, and to provide personal security to high-ranking government officials. These positions may pay as much as \$33,000 a month. Other servicemembers may be hired to provide security to civilians in vehicle convoys with salaries between \$12,000 and \$13,000 per month, while some may be hired to provide site security for buildings and construction projects at somewhat lower salaries.

In testimony before the United States Senate, Defense Secretary Robert Gates was so concerned over the lure of high salaries by the private security sector, he directed Pentagon lawyers to explore putting “non-compete” clauses into contracts with security companies that would limit their recruiting abilities. He stated, in part, as follows: “My personal concern about some of these security contracts is that I worry that sometimes the salaries they are able to pay in fact lures some of our soldiers out of the service to go to work for them” (Burns, 2007, p. 1). In sum, the use of private security contractors creates a secondary labor market for special operations personnel and other highly skilled members of the armed forces that compete against the military’s retention effort.¹¹ Also, the government is ultimately paying the costs of training for many of these personnel, as they are generally veterans of elite military units.

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The next issue involves developing a coherent legal framework that not only holds private security contractors accountable for their misconduct and ensures their rights are adequately protected, but also complies with the letter and spirit of *International Humanitarian Law*. Broadly speaking, the legal architecture governing security contractors must have a domestic component (i.e., U.S. federal, host-nation law, and perhaps even occupation regulations) and an international one (i.e., International Humanitarian and Human Rights Law). As we pull lessons learned forward from the War on Terror to better guide our planning for the future, strategists and planners can learn from the missteps and misjudgments made in attempting to craft a normative patchwork of legal authorities to govern private security contractors.

In terms of domestic law, private security contractors may fall under the law of the nation where they are performing their services. In Iraq, however, Ambassador L. Paul Bremer, in one of his final official acts at the Coalition Provisional Authority, issued an order that provided blanket immunity from prosecution for private security companies for potential crimes while they are operating in the country (Bremer, 2004). That order remained in effect even after the transfer of sovereignty to the Iraqi Government because it was adopted by the Iraqi Government (with much pressure from the U.S. Government). The blanket immunity provision created a great deal of controversy because the private security contractors involved in the September 2007 shooting at Nisour Square in Baghdad were protected by it (Dickinson, 2007).

Corporate warriors are, under certain circumstances, subject to the U.S. Federal Criminal Law via three vehicles—federal Special Maritime and Territorial Jurisdiction (CFR, 2004a), the Military Extraterritorial Jurisdiction Act (MEJA) (CFR, 2004b), as well as the recently amended Uniform Code of Military Justice. All three legal regimes, however, are limited in their application thus raising seri-

ous concerns about their effectiveness to regulate private security contractors (Dickinson, 2007). In their current form, these legal regimes effectively amount to a Venn diagram whose circles don't fully overlap.

In addition to the criminal jurisdiction, there is also a growing amount of domestic civil litigation associated with the conduct of private security contractors on the battlefield—primarily of two types: contractor personnel suing their former employers for tort or contract damages and overseas victims attempting to sue contractors for acts committed overseas. Neither type of litigation has met with a great deal of success, due in large part to substantial defenses available to contractors such as the political question doctrine and “government contractor” defense.

Regarding International Humanitarian Law, concerns are widespread that such private actors engage in combatant-like activities. Journalists, scholars, international lawyers, human rights organizations, nongovernmental organizations, the United Nations, and others have expressed their concerns that armed civilian contractors have been and continue to take a direct or active part in hostilities. Such conduct arguably violates one of the core tenets of International Humanitarian Law—distinction.

Having private security contractors engage in combat and combat-like activities on complex and ambiguous battlefields of today and tomorrow raises concerns that such actors are either unlawful combatants or mercenaries¹² under International Humanitarian Law, thereby compromising their status as civilians. A well-known example from Iraq occurred in 2004 when a small group of private security contractors and U.S. forces fought hundreds of Iraqi militiamen in Najaf, Iraq. In the course of the intense firefight, the private security contractor used one of its helicopters to provide ammunition for the battle and transported a wounded Marine for medical treatment. Accordingly, such security contractors are at risk of prosecution for their war-like acts (i.e., not having combatant immunity), jeopardizing their status as potential prisoners of war under the Third Geneva Convention (DoDI 3020.41, 2005).

The third risk or concern is whether contracting out such critical security functions may create dependency by the U.S. military and other related federal agencies on private security contractors. The classic example of a related federal agency is the Department of State (DoS). Private security contractors have protected diplomats and other DoS personnel in the battlespace during recent armed conflicts. In terms of government officials, private security contractors have regularly provided protection for visiting members of Congress and other dignitaries.

A respected scholar noted, “reliance on a private firm puts an integral part of one's strategic plans at the mercy of a private agent” (Singer, 2003, pp. 158-159). A good illustration of this point involves the September 2007 gun battle at a busy intersection in Baghdad in which heavily armed Blackwater Corporation contractors shot and killed 17 innocent Iraqi civilians (Singer, 2007). The shooting prompted the Iraqi government to insist that Blackwater leave their country (CNN.com/World, 2007). The State Department, whose diplomats and other personnel were protected by Blackwater, halted all diplomatic travel outside

the Green Zone for several days until the matter was resolved (Kramer, Al-Husaini, & Tavernise, 2007). Having cut its Diplomatic Security Service to the bone, the DoS now relies on contractors like Blackwater and DynCorp for security, to the point where it cannot function without them.

LIKEWISE, USING PRIVATE SECURITY CONTRACTORS TO PERFORM CRITICAL WARTIME SECURITY FUNCTIONS RAISES A RELATED CONCERN—DEPENDABILITY.

Likewise, using private security contractors to perform critical wartime security functions raises a related concern—dependability. History has shown that breakdown and defection are greatest from hired armies (Singer, 2003, p. 160). As business entities, private security contractors are motivated, in many cases, by making money. Moreover, the obligations and commitments, legal and moral, which bind private actors to the enterprise are not nearly as strong as those of public ones (Singer, 2003, p. 157). Can the U.S. military rely on private security contractors to perform their missions to the fullest, especially in light of imprecise contractually mandated performance measures in the fog of war (Singer, 2003, p. 157)? If a contractor, either individually or as a corporate entity, breaches its contractual obligations and leaves the operational environment or otherwise stops working for whatever reasons (e.g., too risky, disputes over payment, work conditions, government issued property, etc.), the military may be left in an untenable position as it tries to accomplish its missions.

If the current trend continues and more contractors perform security functions that are the same or similar to those performed by military personnel in an armed conflict, will there be a greater risk (and corresponding lack of control) if private warriors abandon their contractual obligations?¹³ Notwithstanding the fact that Department of Defense guidance provides that the ranking military officer may, in an emergency situation, direct contractors to take lawful actions (usually the prerogative of the contracting officer to direct contractors) (DoD, 2005), the question remains whether contract authority is sufficient to control individuals in life and death situations inherent in combat or is command authority necessary? Simply put, a contract and an oath are not the same thing. In sum, are private security contractors loyal and dedicated to the mission in the same way as members of the armed forces? Are they committed to the cause? Are private security contractors patriots or profiteers? The answer is that they are likely a little of both.

A fourth concern regarding the use of private security contractors in future conflicts relates to a mismatch between the work mandated under the government contract and the mission(s) being performed by the U.S. military. For example, a private security company is retained for the purpose of protecting government officials, including military personnel, convoys, and other valuable assets (Singer, 2007, p. 16). To carry out their work under the contract, some private security contractors drive and act aggressively, seal off roads, ram civilian vehicles, toss smoke bombs, fire warning shots, use tear gas, and engage in

other “cowboy-like behavior” (Singer, 2007, pp. 5-6). Moreover, some private security contractors may not be the least bit concerned with the second- or third-order effects of their behavior. They are focused on getting their principal or “package” off the “X” and protecting him or her with deadly force, if necessary. Blackwater representatives, for example, boast that no American official under their protection has been killed in Iraq (Mulrine, 2007). That is what they are obligated to do under the agreement with the U.S. Government, and that is how they are evaluated and rewarded (e.g., receiving future contracts).

By contrast, in the context of a counterinsurgency, occupation, stability and support operations, or other military engagements in which “winning the hearts and minds of the population” is central to successfully accomplishing the mission, such behavior by agents of the U.S. Government is counterproductive and inflames the populace. In these security environments, arguably, the local population is the critical center of gravity (HQDA, 2006). Accordingly, it is vital for military commanders to adopt appropriate and measured levels of force that accomplish the mission without causing unnecessary loss of life or suffering. Thus, the use of overpowering and intimidating tactics by private security contractors, who are focusing on their contract obligations at the expense of the greater mission, may alienate civilian populations and ultimately undermine the efforts of the military. To further reinforce this point, in many such operations, the local populace does not distinguish between military and contract personnel. Both are Americans. The conduct of the contractors is imputed to the military (Mulrine, 2007). It is a debatable point whether this problem can be solved by contract. Is it possible to draft a statement of work that balances these competing imperatives and enforces through regular contractor remedies, oversight, and incentives? Alternatively, is there something about private security contractors, per se, which creates this risk? In either case, it is an issue that must be explored when considering the use of private security contractors in the future.

In addition to the preceding examples, there are other significant concerns regarding the use of private security contracts. For example, how well can they be integrated into the force structure with communication impediments, security clearance issues, high personnel turnover, and multiple contractors in an area? Is there sufficient governmental oversight to ensure compliance with their contracts? Which functions are inherently governmental, and which functions are appropriate for performance by contractors in an area of combat operations? Are there some regions or cultures that are more conducive to private security contractors than others? Will strategic communications suffer by using such contractors on the battlefield? As the phenomena of using armed security contractors develops further, more concerns will likely emerge.

THE WAY AHEAD

The answer to whether the U.S. military and other federal entities that accompany the armed forces during future armed conflicts should contract for

security services in light of several critical policies, as well as legal and practical risks and concerns depends upon carefully weighing or balancing the benefits of using such private actors to augment our future force structure versus the risks and concerns associated with such a course of action. Some members of Congress have already made up their minds. For example, in November 2007, Congresswoman Janice Schakowsky introduced H.R. 4102—The Stop Outsourcing Security Act. The purpose of the proposed legislation is to phase out the use of private security contractors. If adopted, such legislation would, in my opinion, truncate valuable discussion and analysis regarding the use of private security contractors.

From my perspective, a better approach would involve a more thorough and deliberate consideration of all the issues, either directly or indirectly, related to the benefits and risks associated with the use of private security contractors in the context of future force planning. The framework for such an approach can be found in the 2008 National Defense Authorization Act. As part of that legislative package, Congress created a “Commission on Wartime Contracting Establishment Act.”¹⁴ The commission is a venue to study and investigate wartime contracts and contracting processes in Operations Iraqi Freedom and Enduring Freedom. As part of this effort, the commission will consider many, if not all, of the issues outlined in this article regarding the use of private security contractors on the battlefield. Likewise, governmental entities in support of Congress like the Congressional Budget Office and the Government Accountability Office have done excellent work in helping to frame the issues for the debate (Congressional Budget Office, 2008, p. 11).

Through a coordinated, collaborative, and concentrated effort by both the legislative and executive branches, a way ahead can be forged. If after careful consideration and deliberation, the decision is made to use private security contractors to augment the future force, the political branches of the U.S. Government each have certain institutional roles and competencies they can leverage to forge and shape the future force. For example, the executive branch should adequately consider and then address the use of security contractors (as well as other contractors, more generally) in the NSS, NDS, NMS, QDR, and CCJO. Current strategy documents largely gloss over their use. Of course, the use of contractors on the battlefield is a much larger issue than just security or even intelligence contractors. When the United States is using a number of contractors that is roughly equivalent to the number of uniformed personnel in theater, the ramifications of that approach need to be thoroughly considered.

The legislative branch should create and shape the legal architecture for the legal accountability of contractors in the operational environment. As mentioned previously, the current legal regimes are disconnected and ineffective. Furthermore, do we really want to prosecute contractors under the Uniform Code of Military Justice? Likewise, contractors engaged in commercial activities under hazardous conditions are a recipe for time-consuming and expensive civil litigation that often detracts from mission performance. Accordingly, in crafting an appropriate legal regime, Congress must not only balance the systemic concerns related to the protection of the rights of contractors who are operating in

very challenging, uncertain conditions, but also hold contractors accountable for the same or similar misconduct as their military counterparts.

Both branches must address the issue of what tasks or functions are inherently governmental in nature (under domestic laws and regulations). In doing so, special attention must be paid to ensure taking a direct or active part in hostilities, thereby violating International Humanitarian Law. In many respects, it is this issue that will be the most difficult challenge that law and policymakers face in grappling with the way ahead for a couple of reasons. First, concepts like “inherently governmental activities” and “taking a direct part in hostilities” are vague and very difficult to define. Second, the concepts are at a confluence of legal regimes—one domestic, i.e., public procurement or contract law; and the other international, International Humanitarian Law. The experts who are attempting to craft a solution are rooted in either one disciplinary background (i.e., public contracts or international law) or the other and do not necessarily understand and appreciate the nuances of the companion body of law.

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Lastly, in terms of a way ahead, law and policy makers should think carefully, but creatively about the range of options and the opportunities and risks associated with each option. By way of illustration, security contractors could be retained to perform passive security or training functions when serving in a theater of operations with U.S. forces. They could, for example, guard infrastructure or perform important training functions. In a combat zone, convoy or personal security would be left to members of the armed forces or the diplomatic security services. Alternatively, there may be significant opportunities for security contractors to provide assistance in a peacekeeping or peace enforcement role, as well as protecting nongovernmental organizations as they provide humanitarian aid. Such contractors could be trained and certified by internationally recognized standards and perhaps operate under the auspices of the United Nations. The advantage of such an approach includes lessening the burden on our armed forces to provide such support.

Assuming, for the sake of argument, that the legislative and executive branches agree that these private actors may have the requisite characteristics and capabilities to support the U.S. military and defense strategy under certain circumstances, those decisions should be carefully tested and fine-tuned through war-gaming and appropriate exercises, and adjusted or amended accordingly as the United States proceeds to build its future force.

CONCLUSION

Unquestionably, the role private security contractors should play in augmenting the future force on the battlefield is a complex and challenging issue that law and policy makers must grapple with in the coming years. To properly address the issue, decision makers in both the legislative and executive branches must weigh the benefits associated with the capabilities and characteristics of private security contractors with the costs or risks of using such contractors. Additionally, when making such a calculation, it is important to think creatively and not be overly constrained by past practices in the context of Operations Iraqi Freedom or Enduring Freedom. Only by engaging in such a process can a sound decision be made about the use of private security contractors in future operational environments.

ACKNOWLEDGMENTS

The author gratefully acknowledges the assistance of Professor Gary Solis—currently teaching at Georgetown University and one of the foremost experts on International Humanitarian Law—for his help in understanding and appreciating nuances associated with the application of International Humanitarian Law to the actors in a complex battlespace. U.S. Naval War College Professor Larry McCabe and Phil Carter also provided their invaluable subject matter expertise in reviewing and commenting on the final draft. The author would also like to thank BG Patrick Finnegan, USA, Dean of the Academic Board, United States Military Academy, and COL Maritza Ryan, USA, Head, Department of Law, United States Military Academy, for their encouragement and support.

Author Biography



COL David A. “Dave” Wallace, USA, is a member of the U.S. Army’s Judge Advocate General (JAG) Corps. Currently, he is on the faculty of the Department of Law at West Point.

(E-mail address: david.wallace@usma.edu)

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ENDNOTES

1. This quotation from U.S. Senator Carl Levin appears in the beginning of an article written by Deborah Avant entitled, Think Again: Mercenaries, originally published in *Foreign Policy* (134) in the July/August 2004 ed. (pp. 20-28).
2. In an article entitled Hegemony on the cheap: Liberal Internationalism from Wilson to Bush, published in the *World Policy Journal* (Winter 2003/2004, p. 6), Colin Dueck posits that against this strategic backdrop—the imposition of congressionally mandated force caps—the shifting of key support capabilities to the Reserve Components made it politically easier to contract for support functions.
3. In Jennifer K. Elsea's Congressional Research Service Report for Congress, RL32419, *Private security contractors in Iraq: Background, legal status, and other issues*, updated July 11, 2007, and retrieved January 21, 2008, from <http://www.fas.org/sgp/crs/natsec/RL32419.pdf>, she notes that the 182,000 is based upon news reports. Moreover, of the 182,000, 127,000 are DoD contracts, and a little over 2,500 were Department of State.
4. In an article entitled Private Military Contractors, published September 2004 online by *The Atlantic.com* and retrieved January 29, 2008, from <http://www.theatlantic.com/doc/200409/quirk>, Matthew Quirk also notes that there are a little over 2,500 individuals performing such work for the U.S. Department of State with a great majority of the remainder likely being performed for the Department of Defense.
5. Irregular challenges, as defined in *The National Security Strategy of the United States of America* (March 2006, p. 44), employ methods such as terrorism and insurgency to counter our traditional military advantages, or engaging in criminal activities such as piracy and drug trafficking that threaten regional security.
6. Catastrophic challenges, as defined in *The National Security Strategy of the United States of America* (March 2006, p. 44), involve the acquisition, possession, and use of Weapons of Mass Destruction by state and non-state actors; and deadly pandemics and other natural disasters that produce WMD-like effects.
7. Traditional challenges, as defined in *The National Security Strategy of the United States of America* (March 2006, p. 44), are posed by states employing conventional forces in well-established military competition.
8. Disruptive challenges, as defined in *The National Security Strategy of the United States of America* (March 2006, p. 44), involve state and non-state actors who employ technologies and capabilities in ways to counter the military advantages the United States currently possesses.
9. The so-called 1-1-1 approach frames the strategy around the U.S. forces at steady-state and surge operations in the context of homeland defense, irregular warfare, and conventional campaigns. Moreover, it considers "tailored deterrence" and a two-war capacity.
10. In addition to the operational capabilities, *The National Security Strategy of the United States of America* (March 2006, pp. 12-16) also cites strengthening intelligence, operating from the global commons, projecting and sustaining forces in distant anti-access environments, denying the enemy sanctuary, and conducting network-centric operations.
11. A recently released Congressional Office report took a different view while acknowledging a lack of supporting data on the question of the number of contractor personnel who are former U.S. military or U.S. government civilians. The report, in citing DoD officials, stated that the hiring of experienced military and government personnel by contractors was not causing a significant shortage of certain categories of military personnel at this time. The report, *Contractors' support of U.S. operations in Iraq* (August 2008, p. 11), published by the Congressional Budget Office, was retrieved August 13, 2008, from <http://www.cbo.gov/doc.cfm?index=9688>.
12. In the context of International Humanitarian Law, the most definitive definition of "mercenary" can be found at Article 47 to Additional Protocol I of the Geneva Convention of 1977. It provides as follows:
 2. A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) Does, in fact, take a direct part in the hostilities;
 - (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) Is not a member of the armed forces of a Party to the conflict; and
 - (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.
13. Certainly, concerns about dependency and reliability are not limited to security contractors. There are a number of critical battlefield functions that create vulnerabilities when they are outsourced to private actors. For example, having private contractors performing the maintenance and repair of complex weapon systems and aircraft would certainly fit into that category of risk.
14. The Commission on Wartime Contracting Establishment Act, retrieved January 22, 2008, from <http://thomas.loc.gov/cgi-bin/query/z?c110:S.1825>, states that the development of any regulatory scheme will not happen in a vacuum. There is an ever evolving web of legal authorities, international and domestic, regulations, industry standards, and other pre-existing guidelines governing private security contractors that will also help shape the debate. Additionally, the Commission shall be commissioned of eight members broadly appointed by the Senate Majority leader (2 members); the Speaker of the House of Representatives (2 members); one each of the respective minority leaders from the Senate and House; as well as appointments from the Department of Defense and State.

